Supreme Court, U.S.
FILED

JAN 26 2001

OFFICE OF THE CLERK

(3)

Case No. 00-911

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2000

CECIL WILLIAM COX,
Petitioner,

v.

MICHAEL W. MOORE, as Secretary of the
DEPARTMENT OF CORRECTIONS, State of Florida,
Respondent.

On Petition for Writ of Certiorari
to the Eleventh Circuit Court of Appeals

REPLY BRIEF OF PETITIONER

ROBERT AUGUSTUS HARPER
Robert Augustus Harper Law Firm, P.A.
325 West Park Avenue
Tallahassee, Florida 32301-1413
(850) 224-5900/fax (850) 224-9800
FL Bar No. 127600/GA Bar No. 328360

COUNSEL FOR PETITIONER

14pp

A. TABLE OF CONTENTS AND TABLE OF AUTHORITIES

Page

Table of Contents

A. Table of Contents and Table of Authorities ii

B. Summary of Argument. 1

C. Argument and Citations of Authority. 1

1. The Question Presented (5) of ineffective assistance of counsel claim was squarely presented to and considered by the Eleventh Circuit and presents independent grounds for certiorari review. 1

2. The Questions Presented (3 and 4) are "fairly included" in the issues presented to the Eleventh Circuit. 3

3. The Questions Presented (1 and 2) are not new claims, but merely argument to support the claim that the conduct of counsel in state court was constitutionally deficient. 5

E. Conclusion. 10

Table of Authorities

1. Cases

Arkansas Electric Cooperative Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375, 103 S.Ct. 1905, 76 L.Ed.2d 1 (1983) 3

Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 103 S.Ct. 416, 74 L.Ed.2d 250 (1982) 3

Dugger v. Roderick, 584 So.2d 2 (Fla. 1991) 8

Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) 3

Glover v. United States, — U.S. —, — S.Ct. —, — L.Ed.2d —, 2001 WL 15331 (2001) 2

Hill v. Lockhart, 467 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) 2, 4-7

Kolstad v. American Dental Association, 527 U.S. 526, 119 S.Ct. 2118, 114 L.Ed.2d 494 (1999) 5

Lebron v. National Railroad Passenger Corporation, 513 U.S. 374, 115 S.Ct. 961, 130 L.Ed.2d 902 (1995) 10

R.A.V. v. City of St. Paul, Minnesota, 505 U.S. 377, 223 S.Ct. 2538, 120 L.Ed.2d 305 (1992) 3

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) 2, 4-6

Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981) 4, 8, 9

2. Statutes

28 U.S.C. § 2254(d)(1) 3

3. Other

6th Amend., U.S. Const. 3

Supreme Court Practice, R. Stern, E. Gressman, S. Shapiro & K. Geller (7th ed., 1993) 3

B. Summary of Argument.

The "Questions Presented" by the Petitioner each were raised in or passed on by the Eleventh Circuit, contrary to the assertions by the State of Florida.

C. Argument and Citations of Authority.

1. The Question Presented (5) of ineffective assistance of counsel claim was squarely presented to and considered by the Eleventh Circuit and presents independent grounds for certiorari review.

The issue was directly ruled upon by the Eleventh Circuit. (A-71). The district court found it was "the same claim [raised] in state court on motion for post conviction relief." (A-63). The magistrate characterized the state court ruling as not an "unreasonable application of Federal Law." (A-47-48).

The state court judge ruled that the Defendant/Petitioner Cox had not met his burden to establish that he was prejudiced by misinformation given to him by counsel concerning his

entitlement to provisional credits. (A-19). The magistrate duly noted the state court finding (A-41-42), but found the facts in *Strickland* and *Hill* "were not 'essentially the same' as the facts in this case" (A-45), to similarly conclude Petitioner Cox failed the "prejudice prong of *Hill* and *Strickland*." (A-53). The district court (A-64) and Eleventh Circuit agreed (A-71).

Glover v. United States, — U.S. —, — S.Ct. —, — L.Ed.2d —, 2001 WL 15331 (2001), held that a 6- to 21-month prison term increase was "inconsistent with this Court's cases and unworkable" in defining prejudice under *Strickland*. *Id.* The case before the Court presents the similar issue of whether positive misadvice of counsel on a prison term resulting in an actual 26-year prison sentence increase is prejudicial. *Glover* states that federal jurisprudence as established by Supreme Court precedent would suggest any amount of increased actual jail time would have Sixth Amendment significance. Under *Hill* and *Strickland* positive misadvice resulting in an increase of actual jail time of 26 years would amount to prejudice, and

the question presented should be considered by the Court.

2. The Questions Presented (3 and 4) are "fairly included" in the issues presented to the Eleventh Circuit.

The criteria of what is "fairly included" within the petition are satisfied. *See R.A.V. v. City of St. Paul, Minnesota, supra, citing Arkansas Electric Cooperative Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 382, n.6, 103 S.Ct. 1905, 1911-12, n.6, 76 L.Ed.2d 1 (1983); *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 94, n.9, 103 S.Ct. 416, 421, n.9, 74 L.Ed.2d 250 (1982); *Eddings v. Oklahoma*, 455 U.S. 104, 113, n.9, 102 S.Ct. 869, 876, n.9, 71 L.Ed.2d 1 (1982); *see generally* R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 338 (7th ed., 1993).

The Eleventh Circuit *de novo* ruled that the habeas appeal of Petitioner Cox was (1) not contrary to clearly established United States Supreme Court law and the state court, (2) did not unreasonably apply clearly established United States Supreme Court law. (A-70). The district court held that

"but for the Department's *ex post facto* application for a subsequently enacted statute, the lawyer's advice was essentially correct." (A-64). On appeal to the Eleventh Circuit, Appellant/Petitioner Cox cited *Weaver v. Graham*, 450 U.S. 24 (1981), no less than seven times in the Initial Brief of Appellant (pages 13, 15, 20, 21, 22, 23, and 24) as the main argument that the state court ruling was "'contrary to' clearly established federal law as determined by the United States Supreme Court." (Initial Brief of Appellant, page 15).

Similarly Appellant/Petitioner Cox argued the state court "misapplied clearly established federal law as announced by the United States Supreme Court" and "did not correctly apply the tests set forth in *Strickland v. Washington* [footnote/citation omitted] and *Hill v. Lockhart* [footnote/citation omitted]. (Initial Brief of Appellant, page 25). Appellant/Petitioner argued that *Lynce v. Mathis*, 519 U.S. 433 (1997), was misapplied (Initial Brief of Appellant, pages 7, 17, 19, 20, 21, 23, and 24), and "the state court did not apply

the correct legal principles in deciding Mr. Cox's post conviction motion by holding Mr. Cox to a higher standard of proof than allowed under *Hill* [*v. Lockhart*]." (Initial Brief, page 31). Appellant Cox argued that the state court applied the "but for" test of *Strickland*, rather than the correct standard under *Hill* [*v. Lockhart*]. (Initial Brief, page 32). Appellant argued that the state court order was an unreasonable application of the principles of *Hill*." (Initial Brief of Appellant, page 33).

The questions presented were necessarily considered by the Eleventh Circuit in response to the arguments raised by Appellant/Petitioner Cox and are so integral to the decision of the case that they are "fairly subsumed" by the actual questions presented. *Kolstad v. American Dental Association*, 427 U.S. 526, 540 (1999).

3. The Questions Presented (1 and 2) are not new claims, but merely argument to support the claim that the conduct of counsel in state court was constitutionally

deficient.

The Petitioner in his pleadings filed in federal court relied on *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and *Hill v. Lockhart*, 467 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985), to attack his guilty plea tendered in state court and argued that the state court ruling was contrary to existing case law of the United States Supreme Court. The United States Magistrate in denying relief held that "[t]he facts of *Strickland* and *Hill* were not "essentially the same" as the facts in this case, although the facts in *Hill* were similar." (A-45). The Magistrate continued with his analysis of the facts of *Hill* to conclude *Hill* was not sufficiently similar because the Court did not address whether there might be circumstances under which counsel's erroneous advice on parole eligibility might be deemed constitutionally ineffective, and Petitioner Hill had not alleged the "but for" language. (A-46). Therefore, the Magistrate concluded, "the state court's decision at issue here is not contrary to a Supreme Court

decision on essentially the same facts as a controlling Supreme Court decision because *Hill* was decided upon the failure of the petitioner to allege that he would have gone to trial absent the erroneous advice from counsel." (A-46-47). "[T]hus the facts are not essentially the same." (A-47). The district court judge adopted the report and recommendation. (A-64).

On appeal to the Eleventh Circuit Court of Appeals, Petitioner/Appellant Cox argued that the district court was required to "survey the legal landscape" to ascertain the federal law applicable to a petitioner's claim that was "clearly established" by the United States Supreme Court (Initial Brief of Appellant, page 18). Petitioner agreed a district court must determine whether the state court adjudication under review was "contrary to" the clearly established Supreme Court law. *Id.* Finally, Petitioner agreed if the state court decision is not "contrary to" Supreme Court law, the district court must then determine whether the state court "unreasonably applied" the relevant Supreme Court authority. *Id.* Petitioner argued if he

met either the "contrary to" or "unreasonably applied" tests, he would be entitled to relief. Petitioner argued he would be entitled to relief if the state court failed to use the applicable Supreme Court law. Petitioner/Appellant Cox argued that the magistrate misapplied Supreme Court precedent to the case (Initial Brief of Appellant, pages 19, 21), and that the state court had followed state law (*Roderick*[1]) instead of clearly established federal law (*Weaver*[2]). (Initial Brief of Appellant, page 21).

Petitioner/Appellant argued that in a habeas corpus proceeding under the AEDPA, a federal court must review a state court decision to determine whether the decision "was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The clearly established federal law, as determined by the Supreme Court of

---

[1]*Dugger v. Roderick*, 584 So.2d 2 (Fla. 1991)

[2]*Weaver v. Graham*, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981)

the United States, at the time of Mr. Cox's state post conviction hearing was *Weaver v. Graham*, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981), the state court order denying Mr. Cox post conviction relief was "contrary to" clearly established federal law at the time of the state court proceedings and he is therefore entitled to relief. (Initial Brief of Appellant, p. 24).

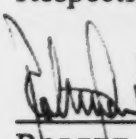
The Eleventh Circuit Court of Appeals in defining the issues presented for appellate review distilled the issues as (1) whether the state court's order was "contrary to" clearly established federal law as established by the United States Supreme Court, (2) whether the state court unreasonably applied clearly established federal law as established by the United States Supreme Court, and (3) whether Petitioner's guilty plea was voluntary, knowing and intelligent because of misadvice by counsel as to the total length of time Petitioner would serve under a 40-year sentence. (A-70). In analyzing issues (1) and (2) the Eleventh Circuit reviewed the mixed questions of law *de novo*. (A-71). The Eleventh Circuit

adopted the report and recommendation of the magistrate and the order of the district court judge. (A-71). The questions presented were fairly presented and are merely refinement of the arguments presented in the Eleventh Circuit. *Lebron v. National Railroad Passenger Corporation*, 513 U.S. at 374, 115 S.Ct. at 961 (1995) [citations omitted].

E. CONCLUSION.

Certiorari review should be granted. The questions presented should be addressed. Briefing on the merits should be ordered. Such relief is hereby respectfully requested.

Respectfully Submitted,



ROBERT AUGUSTUS HARPER
Robert Augustus Harper Law Firm, P.A.
325 West Park Avenue
Tallahassee, Florida 32301-1413
(850) 224-5900/fax (850) 224-9800
FL Bar No. 127600/GA Bar No. 328360

COUNSEL FOR PETITIONER